

1 **ARIZONA CORPORATION COMMISSION**  
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5 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

6 **IN AND FOR THE COUNTY OF MARICOPA**

7 ARIZONA CORPORATION COMMISSION )  
 )  
8 Plaintiff )  
 )  
9 v. )  
 )  
10 H. JON KUNOWSKI, a single man; PRECISION )  
MODEL AND DESIGN, INC., a former Arizona )  
11 corporation; AIR LASE, INC., a former Arizona )  
corporation; AMERICAN INNOVATIVE )  
12 RESEARCH, INC., a former Arizona corporation; )  
JOHN DOES I-V; JANE DOES I-V; WHITE )  
13 CORPORATIONS I-V; BLACK )  
PARTNERSHIPS I-V; and XYZ LIMITED )  
14 LIABILITY COMPANIES I-V, )  
 )  
15 Defendants. )  
 )

No. CV 2004-10042

**APPLICATION FOR TEMPORARY  
RESTRAINING ORDER WITHOUT  
NOTICE AND FOR  
PETITION FOR ORDER TO SHOW  
CAUSE REGARDING APPLICATION  
FOR PRELIMINARY INJUNCTION  
AND ORDER RESTORING MONEY OR  
PROPERTY TO INVESTORS  
AND MEMORANDUM IN SUPPORT  
THEREOF**

16 Plaintiff the Arizona Corporation Commission (the "ACC"), by and through counsel  
17 undersigned and pursuant to A.R.S. §44-2032(1), (2), and (3) and Rule 65, Ariz. R. Civ. P.,  
18 requests this Court to issue a temporary restraining order, without notice, and enter an Order to  
19 Show Cause why this Court should not issue a preliminary injunction and a permanent injunction  
20 against the Defendants, and enter an order restoring to any person in interest any monies or  
21 property, real or personal, that may have been acquired or transferred in violation of the Arizona  
22 Securities Act.

23 The ACC specifically requests this Court to issue an *ex parte* Temporary Restraining Order,  
24 Without Notice, prohibiting Defendants, their employees, agents, servants, officers, directors, and  
25 attorneys, and any other persons in active concert or participation with them, from any of the  
26 following:

1           a.     Violating the Arizona Securities Act (“Securities Act”, and in particular  
2     A.R.S. §§ 44-1841, 44-1842, and 44-1991, in connection with a transaction or transactions  
3     within or from this state involving an offer to sell or buy securities, or a sale or purchase of  
4     securities, by directly or indirectly doing any of the following:

5                 i.     Offering or selling, within or from Arizona, any security that is not  
6                 registered under the Securities Act or that does not fall within a legally recognized  
7                 exemption from registration under the Securities Act;

8                 ii.    Acting as a securities dealer or salesman without being registered as  
9                 such pursuant to the Securities Act;

10                iii.   Employing any device, scheme or artifice to defraud;

11                iv.    Making untrue statements of material fact, or omitting to state any  
12                material fact necessary in order to make the statements made, in the light of the  
13                circumstances in which they were made, not misleading; or

14                v.     Engaging in any transaction, practice or course of business which  
15                operates or would operate as a fraud or deceit.

16           b.     Transferring, secreting, dissipating, altering, selling, pledging, assigning,  
17     encumbering, expending, concealing, conveying, liquidating, or otherwise disposing of any  
18     assets, funds or property owned by any of Defendants, their employees, agents, servants,  
19     officers, directors, and attorneys, and any other persons in active concert or participation  
20     with them.

21     This Application for Temporary Restraining Order, and for Order to Show Cause  
22     Regarding Application for Preliminary Injunction and Order Restoring Money or Property to  
23     Investors (“Application”) is based on the ACC’s Verified Complaint, the following Memorandum  
24     of Points and Authorities, the attached affidavits and exhibits to those affidavits, the remaining  
25     exhibits attached hereto, and the argument of counsel.

26     . . . .

RESPECTFULLY SUBMITTED this 24th day of May, 2004.

ARIZONA CORPORATION COMMISSION

By /s/ Kathleen Coughenour DeLaRosa  
Kathleen Coughenour DeLaRosa  
Attorney for Plaintiff Arizona Corporation  
Commission

## MEMORANDUM OF POINTS AND AUTHORITIES

**I. INTRODUCTION AND PROCEDURAL HISTORY.**

This matter involves an ongoing fraudulent scheme that began in March 1990. Defendants H. Jon Kunowski (“Kunowski”), Precision Model & Design, Inc. (“Precision”), Air Lase, Inc. (“Air”), and American Innovative Research, Inc. (“American”) sold stock in certain of the Entity Defendants,<sup>1</sup> purportedly to obtain funds for production of a laser rendering machine allegedly invented by Kunowski. The Administrative Respondents<sup>2</sup> raised over a million dollars from more than two hundred Arizona investors, representing to those investors that the money would be used to promote and produce Kunowski’s invention. Kunowski admitted to the Securities Division (the “Division”) of the ACC, however, that he used most of the investor funds for personal expenses.

On March 30, 2004, the ACC served on the Administrative Respondents a Temporary Order to Cease and Desist and Notice of Opportunity for Hearing (the “Order”) (copy attached as Exhibit “A” and incorporated herein by reference).<sup>3</sup> The Order notified the Administrative Respondents that they could request a hearing within twenty days following service and that, if they requested a hearing, they were required to answer the allegations contained in the Order within thirty days after service.<sup>4</sup> Kunowski has requested a hearing and answered the allegations of

<sup>1</sup> Precision, Air, American, White Corporations I-V, Black Partnerships I-V, and XYZ Limited Liability Companies I-V may be collectively referred to herein as the “Entity Defendants.”

<sup>2</sup> Kunowski, Precision, Air and American may be collectively referred to herein as the "Administrative Respondents."

<sup>3</sup> Affidavit of Alan C. Walker ("Walker Affidavit") (attached as Exhibit "B" and incorporated herein by reference). ¶ 14.

<sup>4</sup> See Order at page 1, lines 18-20 and page 8, lines 14-16.

1 the Order.<sup>5</sup> The remaining Administrative Respondents are corporate entities (none of which is  
2 currently authorized to do business in Arizona); none has appeared through counsel to request a  
3 hearing or file an answer.<sup>6</sup>

4 Despite having been served with the Order, and in direct violation thereof, the Defendants  
5 have continued to offer and sell interests in Kunowski's inventions, purportedly promoting not only  
6 the original invention(s) but also an additional product Kunowski claims to have invented (a laser  
7 scalpel).<sup>7</sup>

8 **II. STATEMENT OF FACTS.**

9 Beginning in or about March 18, 1990, and continuing thereafter until at least March 30,  
10 2004, Kunowski offered and/or sold securities, primarily in the form of shares of stock in  
11 Precision, Air, and/or American, but also including other interests in the promotion of Kunowski's  
12 purported inventions, to more than 200 investors, most of whom were residents of Arizona.<sup>8</sup>  
13 Kunowski personally provided the Division with records showing he raised more than \$1.3 million  
14 from investors in connection with sales of these investments.<sup>9</sup> The securities were not registered  
15 for sale in Arizona pursuant to the requirements of the Securities Act, nor did they fall within a  
16 recognized exemption from registration, and Kunowski was not registered as a dealer or a salesman  
17 pursuant to the provisions of the Securities Act.<sup>10</sup> Indeed, Kunowski had been advised by an  
18 attorney that the investments did not qualify for a recognized exemption under the Securities Act.<sup>11</sup>

19 Kunowski also committed securities fraud by making untrue statements of material fact or  
20 failing to state material facts necessary to make his representations not misleading in light of the

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21 <sup>5</sup> Walker Affidavit ¶ 15.

22 <sup>6</sup> *Id.*

23 <sup>7</sup> Walker Affidavit ¶¶ 16-18.

24 <sup>8</sup> Order, at page 2, lines 22-24.

25 <sup>9</sup> See the Transcript of Examination Under Oath of Henryk Jon Kunowski, Volume II, December 11, 2003  
26 ("Transcript Vol. II") (attached as Exhibit "D" and incorporated herein by reference), at 67-70 and EUO Exhibit 12  
(attached as Exhibit "H" and incorporated herein by reference); see also Walker Affidavit ¶¶ 3-6.

<sup>10</sup> Walker Affidavit, ¶¶ 8, 9; see also Transcript of Examination Under Oath of Henryk Jon Kunowski,  
Volume I, December 3, 2003 ("Transcript Vol. I") (attached as Exhibit "C" and incorporated herein by reference), at  
15.

<sup>11</sup> Transcript Vol. I at 25.

1 circumstances. His fraudulent conduct included at least the following:

2 (a) Kunowski failed to provide investors and offerees with information adequate  
3 to enable them to fully evaluate the risks of the investments. For example, Kunowski failed  
4 to disclose to investors and offerees the past history of the Administrative Respondents  
5 including but not limited to litigation against the Administrative Respondents, prior business  
6 failures of the Administrative Respondents, and his own prior bankruptcy.<sup>12</sup>

7 (b) Kunowski offered and sold unlicensed or unregistered securities, primarily in  
8 the form of shares of stock. While he promised investors they would receive share certificates  
9 as evidence of the investment, some investors never received share certificates.<sup>13</sup>

10 (c) Kunowski failed to disclose fully the purposes for which he intended to use  
11 the investment capital, which included personal expenses and living expenses not directly  
12 related to the companies. In fact, Kunowski used investor money for personal purposes,  
13 paying personal expenses, taking vacations, and other personal purposes. From more than \$1  
14 million of investor money raised, Kunowski used approximately \$1,220,000, or 93% of the  
15 funds raised, for personal use. When questioned by investors, Kunowski claimed the funds  
16 were "personal loans," which Kunowski never repaid.<sup>14</sup>

17 (d) Kunowski refused to provide investors full disclosure of financial records  
18 pertaining to the Administrative Respondents by denying access to financial documents  
19 concerning the Administrative Respondents, including but not limited to business receipts,  
20 accounts payable, accounts receivable, and other financial records.<sup>15</sup>

21 (e) Kunowski made a pattern and practice of soliciting and obtaining funds from  
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23 <sup>12</sup> See Transcript Vol. I at 14-15; Walker Affidavit ¶ 10. See also offering documents provided to the ACC  
24 by Kunowski during the course of his examination under oath (attached as Exhibit "E" and incorporated herein by  
25 reference); offering documents provided to investors after March 30, 2004 (attached as Exhibit 1 to Walker  
26 Affidavit).

<sup>13</sup> Walker Affidavit ¶ 11.

<sup>14</sup> See Transcript Vol. I at 21, 23-24, 29, 30, 53-54.

<sup>15</sup> See Transcript Vol. I at 23-24, 29. Kunowski claimed to have lost receipts for business expenditures  
totaling \$139,000. *Id.* at 51-52.

1 unqualified and unsophisticated investors.<sup>16</sup>

2 (f) Kunowski represented to investors that the devices or products Administrative  
3 Respondents purportedly intended to produce or manufacture were in the production stage of  
4 development when in fact the products were either in the early design stage only or were in the  
5 experimental stage prior to development of a fully functional prototype.<sup>17</sup>

6 (g) Kunowski offered investments in technology that did not exist or would have  
7 been suppressed for copyright or trademark infringements. For example, Kunowski solicited  
8 and obtained funds for an exclusive movie replica "light saber" that would duplicate or appear  
9 to be an exact copy of a movie prop from the "Star Wars" motion pictures. The  
10 Administrative Respondents never obtained a license from the copyright/trademark holder, nor  
11 did the Kunowski ever conduct due diligence, which would have enabled him to verify that  
12 such a product was already in existence and properly licensed by its copyright/trademark  
13 holder.<sup>18</sup>

14 (h) Kunowski represented that he could produce a laser rendering machine at a  
15 reasonable cost, without having any basis in fact to support that representation.

16 (i) Kunowski represented he had backing to mass-produce such a machine,  
17 when he had no basis in fact supporting that representation.<sup>19</sup>

18 In the course of his examination under oath ("EUO") conducted by the ACC, Kunowski  
19 admitted he was engaged in soliciting funds to pay off past investors and promote the future of the  
20 investment products in which he is involved.<sup>20</sup> As a result, the ACC issued the Order against the  
21 Administrative Respondents.

22 On March 30, 2004, the ACC personally served Kunowski with the Order.<sup>21</sup> Since that date,

23 <sup>16</sup> Transcript Vol. II at 76.

24 <sup>17</sup> Kunowski described the system in a business plan as a "turnkey laser system." See Transcript Vol. II, at  
25 73-74.

<sup>18</sup> Walker Affidavit ¶ 12.

<sup>19</sup> See Transcript Vol. I at 25-26.

<sup>20</sup> See Transcript Vol. I at 55-57.

<sup>21</sup> Walker Affidavit ¶ 18.

1 Kunowski has violated the order, both directly and indirectly through the remaining Defendants or  
2 other entities and individuals, by raising additional monies through sales of stock and/or investment  
3 contracts—despite having represented during his EUO that the Administrative Respondents had  
4 stopped “all of our attempts at securing additional subscribers . . . .”<sup>22</sup>

5 Since March 30, 2004, Defendants have continued to solicit and obtain investors in a  
6 variety of ways, including holding private meetings at Kunowski’s home to offer the investments.<sup>23</sup>  
7 Defendants’ current investment programs (identical or virtually identical to those barred by the  
8 ACC’s Order) include soliciting investments in the promotion and production of a laser rendering  
9 device, a laser scalpel, and a “light saber” inspired by the “Star Wars” movie series.<sup>24</sup> Kunowski  
10 has represented to recent investors that he has a model display made for a new Playboy Hotel to be  
11 built in Las Vegas, Nevada, which is currently on display at the Bellagio Hotel in Las Vegas. A  
12 check with Playboy, Inc. reveals that the company has no current plans to build a Las Vegas hotel,  
13 nor have they had any contact with the Defendants regarding a Las Vegas project.<sup>25</sup> Moreover, the  
14 Bellagio Hotel has no display board produced by Defendants set up anywhere on its property.<sup>26</sup>  
15 Defendants promoted the investment programs by representing to potential investors that their  
16 investments would enable Kunowski to promote and produce his inventions.<sup>27</sup>

17 The Defendants have violated the ACC Order by continuing to solicit and raise money from  
18 investors following service of that Order.<sup>28</sup> A substantial risk exists that Defendants will continue  
19 to violate the ACC’s Order, and will continue to convert investor funds to their own uses, unless  
20 this Court acts to restrain them, and to enjoin further violations of the Securities Act.

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22 <sup>22</sup> See Transcript Vol. I at 46.

23 <sup>23</sup> Affidavit of Glen Dishman (“Dishman Affidavit”) (attached hereto as Exhibit “F” and incorporated  
24 herein by this reference); Affidavit of Thomas A. Durkerley (“Durkerley Affidavit”) (attached hereto as Exhibit “G”  
and incorporated herein by this reference).

25 <sup>24</sup> See Order at page 7, lines 18-20; Exhibit “E”; and Exhibit 1 to Walker Affidavit.

26 <sup>25</sup> Walker Affidavit, ¶ 20.

27 <sup>26</sup> Walker Affidavit, ¶ 21.

28 <sup>27</sup> See Exhibit 1 to Walker Affidavit; *see also* Dishman Affidavit and Durkerley Affidavit..

<sup>28</sup> See Dishman Affidavit; Durkerley Affidavit.

1 **III. LEGAL ANALYSIS.**

2 **A. The Defendants Are Continuing to Violate the Registration Provisions of the**  
3 **Securities Act and the Prohibition Against Such Violations in the ACC Order.**

4 **1. Under Arizona law, Defendants must register their securities or transact**  
5 **business within a recognized exemption from registration, and must**  
6 **themselves register as dealers or salesmen.**

7 “By legislative design, the Securities Act of Arizona (the ‘Securities Act’) protects the  
8 public by preventing dishonest promoters from selling financial schemes to unwary investors who  
9 have little or no knowledge of the realistic likelihood of the success of their investments.” *Siporin*  
10 *v. Carrington*, 200 Ariz. 97, 98, 23 P.3d 92, 93 (App. 2001). The facts demonstrate that  
11 Defendants have issued, offered, and sold (and continue to issue, offer, and sell) securities in the  
12 form of stock and/or investment contracts that are neither registered nor exempt from registration.

13 In any civil or criminal action, the burden of proving the existence of an exemption from  
14 registration under the Securities Act falls on the party raising that defense. A.R.S. § 44-2033; *see*  
15 *also State v. Barber*, 133 Ariz. 572, 578, 653 P.2d 29, 35 (App. 1982). Assuming, *arguendo*, that  
16 any of the Defendants raise a defense of exemption from registration, under the circumstances of  
17 this case, no applicable exemption is available. Furthermore, none of the Defendants were  
18 registered as dealers or salesmen (or exempt from registration) as required under the Securities Act.  
19 A.R.S. § 44-1842.

20 **2. The investments are “securities” under Arizona law.**

21 The Securities Act definition of “securities” specifically includes stock as a security.  
22 A.R.S. § 44-1801(26). An interest in a business venture also becomes a security if it falls within  
23 the definition of an “investment contract.”

24 Investment contracts, by definition, are securities. A.R.S. § 44-1801(26) (“Security means  
25 . . . investment contract . . .”) The first U.S. Supreme Court case fully describing an investment  
26 contract is *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946). Under the *Howey* test, an investment  
contract exists if a transaction involves (1) an investment of money or other consideration; (2) in a



1 common enterprise; and (3) with the expectation of profits earned solely from the efforts of  
2 others.<sup>29</sup> In Arizona, the *Howey* test remains the basis for investment contract analysis, although  
3 more recent case law has served to expand and clarify the test. Arizona courts, citing *Howey*, agree  
4 that the classification of investment contracts embodies “a flexible rather than static principle, one  
5 that is capable of adaptation to meet the countless and variable schemes devised by those who seek  
6 to use the money of others on the promise of profits.” *Nutek Info. Sys., Inc. v. Arizona Corp.*  
7 *Comm’n*, 194 Ariz. 104, 108, 977 P.2d 826, 830 (App. 1998); *see also Rose v. Dobras*, 128 Ariz.  
8 209, 211, 624 P.2d 887, 890 (App. 1981). Arizona courts have developed flexible interpretations  
9 for each of the three prongs of *Howey*.

10 The first element of the *Howey* test—the investment of money—was satisfied when  
11 investors tendered funds to Defendants.<sup>30</sup>

12 With respect to the second element, “[t]wo tests have been developed to determine the  
13 existence of a common enterprise in order to satisfy the second prong of the *Howey* test: (1) the  
14 horizontal commonality test and (2) the vertical commonality test.” *Daggett v. Jackie Fine Arts,*  
15 *Inc.*, 152 Ariz. 559, 565, 733 P.2d 1142, 1148 (App. 1986).<sup>31</sup> Either horizontal or vertical  
16 commonality satisfies the requirement in Arizona. *Id.* at 566, 733 P.2d at 1149.

17 Kunowski’s scheme fulfills both tests. The investor funds were pooled under Kunowski’s  
18 management, satisfying the horizontal commonality test. Any potential profits allegedly available  
19 from production and marketing of Kunowski’s inventions would be shared between Kunowski and  
20 the investors, establishing vertical commonality.<sup>32</sup>

21 The third (and final) element of the *Howey* test has evolved since the Supreme Court  
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23 <sup>29</sup> The *Howey* court used the phrase “solely from the efforts of others”; the Ninth Circuit Court of Appeals,  
24 however, modified “solely” to “substantially” in *SEC v. Glenn W. Turner Enterprises*, 474 F.2d 476, 482 (9<sup>th</sup> Cir.  
1973).

25 <sup>30</sup> See Verified Complaint, ¶¶ 11, 14.

26 <sup>31</sup> Horizontal commonality requires a pooling of investor funds collectively managed by a promoter or third  
party. *Daggett*, 152 Ariz. at 565, 733 P.2d at 1148. Vertical commonality is established by demonstrating a positive  
correlation between the investor’s potential profits and the promoter’s potential profits. *Id.* at 566, 733 P.2d at 1149.

<sup>32</sup> See Verified Complaint, ¶ 16.

1 developed it more than 50 years ago. To satisfy that third *Howey* prong in Arizona, one must  
2 establish only that efforts made by those other than the investors were the undeniably significant  
3 efforts, and were those essential managerial efforts that affected the failure or success of the  
4 enterprise. *Nutek*, 194 Ariz. at 108, 977 P.2d at 830.

5 Kunowski was the primary “mover and shaker” with respect to producing and marketing  
6 his inventions. The investors’ only participation was to provide their money.<sup>33</sup> This establishes the  
7 third prong of the *Howey* test.

8 Defendants’ offering thus satisfies all three elements of the *Howey* test. Defendants touted  
9 the income-producing benefits of an investment in purportedly new technology. Investors  
10 surrendered their money believing that they were purchasing shares in a company that would  
11 produce exciting new products and provide a substantial return. Defendants controlled the funds,  
12 and would have been responsible for any potential return on those funds. Indeed, Defendants have  
13 been the primary beneficiary of the investors’ funds through use of their fraudulent scheme.<sup>34</sup>

14 **B. Defendants Are Continuing to Violate the Antifraud Provisions of the**  
15 **Securities Act and the Prohibitions Against Such Violations in the ACC Order.**

16 The Securities Act describes as “a fraudulent practice and unlawful” if a person, in  
17 connection with a transaction or transactions within or from this state involving an offer to sell or  
18 buy securities, or a sale or purchase of securities, directly or indirectly does any of the following:  
19 (1) employs any device, scheme or artifice to defraud; (2) makes untrue statements of material fact,  
20 or omits to state any material fact necessary in order to make the statements made, in the light of  
21 the circumstances in which they were made, not misleading; or (3) engages in any transaction,  
22 practice or course of business which operates or would operate as a fraud or deceit. A.R.S.  
23 § 44-1991(A). Any one of these acts is securities fraud. *Hernandez v. Superior Court*, 179 Ariz.  
24 515, 880 P.2d 735 (App. 1994).

25  
26 <sup>33</sup> See Dishman Affidavit, Durkerley Affidavit.

<sup>34</sup> See Order ¶ 7(c); see also Walker Affidavit ¶ 7; see also *supra* at p. 5.

1 A primary violation of A.R.S. § 44-1991 can be either direct or indirect. It is now well-  
2 settled in Arizona that courts do not narrowly interpret even *indirect* violations of § 44-1991.  
3 *Barnes v. Vozack*, 113 Ariz. 269, 550 P.2d 1070 (1976) (officers of company could be liable under  
4 A.R.S. § 44-1991 for the fraudulent statements of a salesman of the security)

5 In the context of these provisions, “materiality” means a substantial likelihood that, under all  
6 the circumstances, the misstated or omitted fact would have assumed actual significance in the  
7 deliberations of a reasonable buyer. *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733  
8 P.2d 1131, 1136 (1986). Under this objective test, the Court need not investigate whether an omission  
9 or misstatement was actually significant to a particular buyer. The affirmative duty not in any way to  
10 mislead potential investors places a heavy burden on the offeror of the securities, and removes the  
11 burden of investigation from the investor. *Id.* A misrepresentation or omission of a material fact in  
12 the offer and sale of a security is actionable even though it may be unintended or the falsity or  
13 misleading character of the statement may be unknown. In other words, *scienter* or guilty knowledge  
14 is not an element of a civil violation of the antifraud statute. *See, e.g., State v. Gunnison*, 127 Ariz.  
15 110, 113, 618 P.2d 604, 607 (1980). Stated differently, a seller of securities is strictly liable for  
16 misrepresentations or omissions. *Rose v. Dobras*, 128 Ariz. at 214, 624 P.2d at 892. The law also  
17 imposes no requirement to show that investors actually relied on the misrepresentations or omissions  
18 (*Id.* at 214, 624 P.2d at 891), or that the misrepresentations or omissions caused injury to investors  
19 (*Trimble*, 152 Ariz. at 553, 733 P.2d at 1136). In this case, the representations and omissions plainly  
20 were material.

21 Defendants’ previous actions in violation of A.R.S. § 44-1991 were detailed at pages 4-6,  
22 *supra*. Furthermore, as set out in the Verified Complaint, the Defendants now have also violated  
23 A.R.S. § 44-1991 by: (1) failing to disclose cease and desist order against the Administrative  
24 Respondents; (2) failing to disclose to investors that their funds were not being used as represented to  
25 them; and (3) representing that a display board created by one of Kunowski’s invention was on display  
26 at the Bellagio in Las Vegas, when in fact no such item is being exhibited there. Any *one* of these

1 actions would violate the Securities Act. Together, they show egregious and fraudulent conduct by  
2 Defendants that must be restrained before it causes additional damage to the investing public.

3 **IV. THE COURT SHOULD GRANT THE RELIEF REQUESTED IN THE ACC’S**  
4 **VERIFIED COMPLAINT AND IN THIS APPLICATION.**

5 **A. Injunctive Relief Is Appropriate in the Circumstances of This Case.**

6 **1. *The Court should issue a temporary restraining order without notice.***

7 The ACC may seek emergency relief when it appears a person is engaged or is about to  
8 engage in acts or practices that violate the Securities Act or an ACC order. A.R.S.  
9 § 44-2032(2).<sup>35</sup> Defendants’ actions justify emergency relief in this matter; not only have  
10 Defendants repeatedly violated the Arizona Securities Act but because that conduct is  
11 continuing—Defendants continue to offer and sell investments in Kunowski’s purported  
12 inventions, in continued violation of A.R.S. §§ 44-1841, 44-1842, and 44-1991. A temporary  
13 restraining order is necessary to halt the ongoing scheme and to prevent additional securities  
14 violations, which are occurring or are about to occur. Defendants have engaged in unlawful and  
15 fraudulent conduct in the past, have continued to engage in such conduct despite an ACC Order  
16 barring that conduct, and have the current ability to continue engaging in that scheme.

17 The Court should issue a temporary restraining order without providing advance notice to  
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19 <sup>35</sup> That section provides:

20 If it appears to the commission, either on complaint or otherwise, that any  
21 person has engaged in, is engaging in or is about to engage in any act, practice or  
transaction that constitutes a violation of this chapter, or any rule or order of the  
commission under this chapter, the commission may, in its discretion:

\* \* \* \*

22 (2) Apply to the superior court in Maricopa county or any federal court  
23 for an injunction restraining the person from the violation, and on a showing by the  
commission that the person has engaged in, is engaging in or is about to engage in  
24 an act, practice or transaction in violation of this chapter or any rule or order of the  
commission, a temporary restraining order, preliminary injunction or permanent  
25 injunction shall be granted without bond. Process in those actions may be served  
on the defendant in any county of this state in which the defendant transacts  
business or is found.”

\* \* \* \*

26 A.R.S. § 44-2032.

1 the Defendants. The current investors have observed that Kunowski is living in a virtually empty  
2 house, which would make it quite easy for him to pack up and leave without notice, with  
3 whatever money he has raised, to the obvious detriment of the investors.<sup>36</sup> Moreover,  
4 Kunowski's behavior during meetings with investors suggests he suspects he may be subject to  
5 further legal action. During an investor meeting, Kunowski went outside and walked completely  
6 around his house. That action suggests he may have been checking to see that his meeting was  
7 not under surveillance.<sup>37</sup> If Kunowski receives advance warning of the possible entry of a  
8 Temporary Restraining Order, the Division reasonably believes he may choose to "take the  
9 money and run."

10 **2. The Court should issue preliminary and permanent injunctions.**

11 A.R.S. § 44-2032(2) authorizes the ACC to seek injunctive relief when it appears that a  
12 person is engaged or is about to engage in acts or practices that violate the Securities Act. "In  
13 actions for statutory injunctions . . . the moving party need show only that probable cause exists to  
14 believe that the statute in question is being violated and that there is some reasonable likelihood of  
15 future violations." *United State v. Richlyn Laboratories, Inc.*, 827 F. Supp. 1145, 1150 (E.D. Pa.  
16 1992) (injunction under Food, Drug and Cosmetic Act); *S.E.C. v. Globus International, Ltd.*, 320  
17 F. Supp. 158 (S.D.N.Y. 1970) (similar ruling under Federal Securities Act and Securities and  
18 Exchange Act.) When analyzing the need for injunctive relief, courts focus on whether a  
19 reasonable likelihood exists that the defendant, if not enjoined, will engage in future illegal  
20 conduct. *SEC v. Comserv Corp.*, 908 F.2d 1407, 1412 (8th Cir. 1990). Past misconduct is highly  
21 suggestive of future violations. *Richlyn*, 827 F. Supp. at 1150. In determining the likelihood of  
22 future violations, the court should consider the totality of the circumstances. *SEC v. Murphy*, 626  
23 F.2d 633, 655 (9th Cir. 1980).

24 The factors a court may consider when deciding whether to grant or deny injunctive relief  
25

26 <sup>36</sup> See Walker Affidavit ¶ 26.

<sup>37</sup> See Walker Affidavit ¶ 27.

1 include the egregious nature of the defendant's actions, the isolated or recurrent nature of the  
2 violations, the degree of *scienter* involved, the sincerity of the defendant's assurances (if any)  
3 against future violations, the defendant's recognition of the wrongful nature of his conduct, and the  
4 likelihood that the defendant's occupation will present opportunities (or lack thereof) for future  
5 violations. *See, e.g., S.E.C. v. Fife*, 311 F.3d 1, 8-9 (1<sup>st</sup> Cir. 2002); *Murphy*, 626 F.2d at 655-57. In  
6 an action for a statutory injunction, however, a different standard applies. *Richlyn*, 827 F. Supp. at  
7 1150. "[B]ecause [the legislative body] has seen fit to act in a given area by enacting a statute,  
8 irreparable injury must be **presumed** in a statutory enforcement action." *Id.* (emphasis added)  
9 (citing *United States v. Odessa Union Warehouse Co-Op*, 833 F.2d 172, 176 (9<sup>th</sup> Cir. 1987)).

10 In actions for statutory injunctions, then, the moving party need show  
11 only that probable cause exists to believe that the statute in question  
12 is being violated and that there is some reasonable likelihood of  
13 future violations. *Instant Air Freight Co. v. C.F. Freight, Inc.*, [882  
14 F.2d 797 (3d Cir. 1989)] at 803; *Commodity Futures Trading*  
15 *Commission v. Hunt*, 591 F.2d 1211, 1220 (7<sup>th</sup> Cir. 1979), *cert.*  
16 *denied*, 442 U.S. 921, 99 S. Ct. 2848, 61 L. Ed. 2d 290 (1979),  
17 *rehearing denied*, 444 U.S. 888, 100 S. Ct. 189, 62 L. Ed. 2d 122  
18 (1979). No specific or immediate showing of the precise way in  
19 which violations of the law will result in public harm is required.  
20 *United States v. Diapulse Corp.*, . . . 457 F.2d [25 (2d Cir. 1972)] at  
21 28.

22 *Richlyn*, 827 F. Supp. at 1150.

23 Preliminary and permanent injunctive relief against Defendants is appropriate. Their  
24 violations were not merely technical, but were of provisions that lie at the very heart of the  
25 remedial statutes in the Securities Act. Defendants simply lied to investors and took their money.

26 Defendants' wrongs were not an isolated incident, unlikely to recur; instead, they  
repeatedly committed similar violations, resulting in victim losses exceeding a million dollars over  
the course of Defendants' continued activity. Kunowski has been engaged in the same type of  
conduct for more than ten years. Defendants' repeated and persistent misconduct justifies  
injunctive relief.

Emergency relief likewise is warranted in this matter, as is shown by the Walker, Dishman,

and Durkerley Affidavits, which verify that the Defendants continue to offer and sell unregistered securities in continued violation of the Securities Act and the ACC Order. Defendants have engaged in fraudulent activities in the past and continue to engage in similar conduct. Injunctive relief is required to halt the ongoing scheme and to prevent additional violations of the Securities Act and the ACC Order.

**B. The Court Enter an Order Restoring to the Investors the Money or Property Transferred by or to Defendants in Violation of the Securities Act.**

The Securities Act also permits this Court to “enter an order restoring to any person in interest any monies or property, real or personal, that may have been acquired or transferred in violation of this chapter.” A.R.S. § 44-2032(3). The ACC requests the court, in the course of entering a permanent injunction herein, to enter such an order.

## V. CONCLUSION

Based on the foregoing facts and for the reasons set forth above, the ACC respectfully requests that the Count enter the attached order.

RESPECTFULLY SUBMITTED this 24th day of May, 2004.

ARIZONA CORPORATION COMMISSION

By /s/ Kathleen Coughenour DeLaRosa  
Kathleen Coughenour DeLaRosa  
Attorney for Plaintiff Arizona Corporation  
Commission

**EXHIBITS**

Arizona Corporation Commission Temporary Order to Cease and Desist and Notice of Opportunity for Hearing as to Respondents H. Jon Kunowski, Precision Model & Design, Inc., Air Lase, Inc., and American Innovative Research, Inc., dated March 24, 2004	Exhibit "A"
Affidavit of Alan C. Walker, dated May 17, 2004	Exhibit "B"
Transcript of Examination Under Oath of Henryk Jon Kunowski, Volume I, December 3, 2003	Exhibit "C"
Transcript of Examination Under Oath of Henryk Jon Kunowski, Volume II, December 11, 2003	Exhibit "D"
Offering documents provided by Kunowski during his Examination Under Oath conducted on December 3 and 11, 2003	Exhibit "E"
Affidavit of Glen Dishman, dated May 3, 2004	Exhibit "F"
Affidavit of Thomas A. Durkerley, dated May 3, 2004	Exhibit "G"
Exhibit 12 to the Examination Under Oath of Henryk Jon Kunowski, Volume II, December 11, 2003, investor list sent by e-mail to Alan C. Walker	Exhibit "H"